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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re CASIDIE C., a Person Coming Under
the Juvenile Court Law.

LAKE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

JONATHON C.,

Defendant and Appellant.

A095726

(Lake County
Super. Ct. No. JV-4673-B)

On appeal from an order terminating his parental rights under Welfare and Institutions Code section 366.26,¹ Jonathon C.² (the father) contends that the trial court erred in failing to appoint counsel for Casidie C. (the child), the Department of Social Services failed to pursue relative placement options, the adoption assessment was deficient; and the court abused its discretion in denying a continuance, all of which resulted in a miscarriage of justice. We affirm.

¹ All statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

² In some portions of the record and briefs the father's name is spelled Jonathan. The spelling which the father uses, and therefore the correct spelling, is Jonathon.

Background

We begin our factual and procedural statement with portions of our opinion previously filed in *Jonathon C. v. The Superior Court of Lake County* (June 19, 2001) A094754.³

On February 29, 2000, the Lake County Department of Social Services filed a petition pursuant to section 300, subdivisions (b) and (g), alleging failure to protect and support the 10-month-old child, Casadie C., and her 2-year-old half sister, Kendra T. (father unknown). There had been numerous previous referrals, and the children had been detained three times in the previous year due to filthy conditions in the mother's home. For example, a closet was filled with garbage, and there was garbage on the floor of every room of the home. There was no edible food in the home. The mother, who is not a party to this proceeding, had told the social worker, on February 9, 2000, "I do not have a fucking drug problem," and then threw her case plan in a dumpster on her way out of the Department office. Her whereabouts were unknown at the time of the petition, and she had told the Department she was homeless and unable to care for her children. The father was incarcerated at Coalinga for assaulting an officer.

A report prepared for the disposition hearing on April 17, 2000, stated the mother had a long-standing drug problem and refused to sign a case plan or discuss services. The court had ordered the father transported to the disposition hearing and the social worker looked forward to hearing his intentions regarding services and custody of the child. However, the father was not transported to the hearing, and the court continued the matter to May 8, 2000. The father was present on the latter date, and the court appointed counsel for him. On May 15, the court heard the father's testimony and adopted the findings and recommendation of the social worker.

³ The clerk's transcript in this appeal does not contain a copy of our opinion in the writ proceeding. We hereby take judicial notice of our opinion in *Jonathon C. v. The Superior Court of Lake County* (June 19, 2001) A094754, and direct the clerk of this court to place a copy of that opinion in the file of this case.

The status review report for the six-month hearing on October 16, 2000, stated that following the father's release from prison in June 2000, he signed a voluntary case plan. He attended three parenting classes and one counseling group before being arrested and incarcerated at San Quentin in August 2000, for parole violation. He was released on September 20, 2000, contacted the social worker, and stated his intent to begin work on his case plan. He said he would do whatever it took to get the child back. He and the mother were living in a cabin in Clearlake Oaks, and the father was employed full time in a restaurant. Visits were going well and there was evidence suggesting the mother would be able to reunify with an additional five months of services, thereby meeting the statutory time limit. The same could not be said about the father because of his incarceration.

The five-month objectives for the parents included preparing a safe, healthy, drug and alcohol free home for the children and demonstrating their capacity to co-parent the children in a responsible mature fashion without engaging in illegal behavior. The father's plan required that he complete 12 goals which included attending parenting classes, completing a substance abuse evaluation, submitting to random drug testing, and maintaining a stable residence. On October 16, 2000, the court adopted the social worker's findings and continued the matter to March 5, 2001, for 12-month review.

The status review report filed on February 23, 2001, stated that the social worker had contact with the father three times in October 2000, and once in November. The father was incarcerated in November, and the social worker had in person contact with him at the Hill Road Correctional Facility on February 7, 2001. He was not in compliance with his case plan. He had not attended parenting classes, had not had a substance abuse evaluation, had not made himself available for drug testing, and had not maintained a stable residence. He had either been unemployed or incarcerated since the last hearing and therefore had not maintained a verifiable legal source of income. He had not kept the social worker informed of any of his changes in address, and he had not made himself available for appointments or visits. He told the social worker he "does not want to lose his parental right but has stated that he must first deal with his addiction

before he can deal with anything else.” He had been accepted into a residential program that would last at least one year. At the time of the report he was awaiting sentencing for felony charges. After the father was arrested, the mother became depressed and stopped participating in services and did not make herself available. The children were doing well in a home where they were wanted on a permanent basis.

The social worker recommended termination of reunification services and setting a section 366.26 hearing. The court followed this recommendation on March 12, 2001. The father filed a writ petition in this court arguing that the Department had made insufficient efforts to accommodate his needs as an incarcerated parent. We denied the writ stating that under the statutory criteria services need not have been provided while the father was incarcerated (§ 361.5, subd. (e)(1)), and that in any event because of his circumstances it was not possible for him to reunify with the child within the statutory time limit.

On July 9, 2001,⁴ the father was in custody; his attorney, Cheryl Turner, appeared in court and requested a continuance because the father had not received a copy of the section 366.26 report. The court ordered that he be served with a copy of the report and transported to court on July 16.

The report, which had been filed June 28, 2001, recommended adoption as the permanent plan for the child, and it appeared likely she would be adopted by her current caregivers if parental rights were terminated. An adoption assessment stated that the two-year-old child was healthy and happy with her prospective adopting parents and that it would be to her detriment to remove her. According to case documents there was little evidence of bonding between the father and the child, because the father had been incarcerated most of the child’s life. He remained incarcerated on the date of the

⁴ The reporter’s transcript of the hearing on July 9, bears the erroneous date of July 17, 2001. However, it is clear from the minutes at page 142 of the clerk’s transcript and from the context that the correct date is July 9, 2001.

assessment, June 27, 2001. The adoption specialist concluded that the child would not benefit from continuing a relationship with either of her birth parents.

The father and his attorney were present at the section 366.26 hearing on July 16, 2001. Counsel said she had recently been in contact, through the father's sister, with the father's mother, who lived out of state, and who wanted to seek placement of the child with her. The father's counsel asked that the Department contact the father to obtain necessary information with a guardianship placement in mind. The Department argued that this suggestion came too late and that the foster family now had priority because the relative had never come forward or expressed interest. Furthermore, the Department understood that the paternal grandmother had a criminal background. The court declined to continue the matter. The court found by clear and convincing evidence the child would be adopted, terminated the father's parental rights, and continued the matter for a six-month review.

The father filed timely notice of appeal the next day.

Discussion

The father argues issues which arose at or before the order setting the section 366.26 hearing (the referral order), namely, (1) relying on section 317, subdivision (c), the father contends that the trial court erred when it failed to appoint counsel for the child;⁵ and (2) he argues that the Department failed to investigate and assess preferential relative placement options at any stage of the proceedings. The Department contends the father is precluded from raising these issues because he failed to raise them in his writ petition following the referral order. We agree.

Section 366.26, subdivision (1)(1) provides that an order under section 366.26 is not appealable unless the party filed a timely petition for extraordinary writ review, the petition "substantially addressed the specific issues to be challenged and supported that

⁵ The cited statute provides in part: "Where a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding. . . ." (§ 317, subd. (c).)

challenge by an adequate record,” and the petition was summarily denied or otherwise not decided on the merits. The father did file a petition, but he did not address the issues of counsel for the child or preferential relative placement, and we did not summarily deny the petition, but rather denied it on the merits. Section 366.26, subdivision (l)(2) states, “Failure to . . . substantively address the specific issues challenged . . . shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.” (See also Cal. Rules of Court, rule 39.1B(e); rule 1436.5(c).)

Section 366.26 subdivision (l)(1) has been described as the Legislature’s unequivocal expression of its intent that referral orders be challenged by writ before the section 366.26 hearing. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 447.) The *Rashad* court explained: “Because the trial court must conduct the section 366.26 hearing promptly, the traditional rule of appealability is ineffective in providing the parties meaningful review before the trial court has selected a permanent plan. [Citation.] Thus, cases which have applied the various versions of the statute since 1989 have concluded that contentions designed to overturn a referral order are not cognizable on appeal unless writ review was sought [Citations].” (*Id.* at pp. 447-448.)

Since the father’s claims in question are designed to overturn or are subsumed in the referral order, they are not cognizable on this appeal. (*Id.* at p. 448.)

The same reasoning applies to the father’s complaint about the adoption assessment prepared by the California Department of Social Services. He contends the adoption assessment was inadequate because it failed to address the amount and nature of any contact between the child and members of her extended family, which is defined by statute to include siblings, grandparents, aunts and uncles. (§ 366.22, subd. (b)(2).) He argues that the CDSS “appeared as ignorant as the Lake County Department was about the existence of any relatives.” This contention is simply a different way of arguing that the paternal grandmother was denied her right to preferential placement, an issue the father waived, as discussed above, by failing to raise it in the writ proceeding.

Furthermore, even if the father had not waived the relative placement issue and it were otherwise cognizable on appeal, he lacks standing to raise it on appeal after his

reunification services were terminated. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035; see *In re Baby Girl D.* (1989) 208 Cal.App.3d 1489, 1493-1494.)

The father raises one issue which is arguably cognizable on appeal even though it is predicated on the relative placement contention. He argues that the court erred in denying his request for a continuance at the section 366.26 hearing. At the hearing the father's counsel asked that the matter be continued until the Department could contact the paternal grandmother and pursue whether placement with her would be appropriate. After hearing argument the court denied the continuance. No abuse of discretion appears. First, the statute that provides for relative preference contemplates that the relative "request" placement of the child. (§ 361.3, subd. (a).) The court had before it only a double hearsay statement from counsel quoting the grandmother's sister expressing the interest of the grandmother. The court did not err in refusing to continue the section 366.26 hearing based on such a weak showing. Second, if the grandmother's alleged interest was genuine (rather than just a delay tactic), the father could have filed a modification petition under section 388 earlier in the proceedings, before the child had developed substantial emotional ties to the foster parents. (*In re Baby Girl D.*, *supra*, 208 Cal.App.3d at p. 1494.) And finally, although there is a statutory preference for relative placement, the best interests of the child must be the court's overriding concern. (E.g., *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1068.) On this record it is clear that the court's denial of a continuance was proper.⁶

⁶ The child filed a brief agreeing with the Department that the father has no standing and that the orders of the trial court should be affirmed. Exhibits attached to the child's brief contain strong indication that the grandmother would not qualify for placement of the child and that therefore any error regarding failure to investigate relative placement, even if cognizable, would be harmless. Father then attached to his reply brief affidavits tending to indicate otherwise.

Although there is authority that this court may consider subsequent factual developments on appeal, in light of our holding there is no need to invoke that rule in this

Disposition

The orders under section 366.26 entered on July 16, 2001, are affirmed.

Stein, J.

We concur:

Marchiano, P.J.

Swager, J.

case. (See, *In re Elise K.* (1982) 33 Cal.3d 138, 139-151; *In re Junious M.* (1983) 144 Cal.App.3d 786, 796-797.)